

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED
APR 29 2003

Michael N. Milby, Clerk

IN RE ENRON CORPORATION
SECURITIES, DERIVATIVE &
"ERISA" LITIGATION

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§
§

MDL 1446

MARK NEWBY, ET AL.,

§
§
§

V.

CIVIL ACTION NO. H-01-3624 ✓
AND CONSOLIDATED CASES

ENRON CORPORATION, ET AL.

§
§

LILA WARD, Individually and On
Behalf of All Others Similarly Situated

§
§
§

V.

CONSOLIDATED CASE

STANLEY C. HORTON, ET AL.

§
§

**MEMORANDUM IN SUPPORT OF THE MOTION OF
THE HENRY GROUP FOR APPOINTMENT AS LEAD PLAINTIFF
AND FOR APPROVAL OF SELECTION OF LEAD AND LIAISON COUNSEL**

ORIGINAL

#1356

PRELIMINARY STATEMENT

Presently pending before this Court is a securities class action lawsuit (the "Action") brought on behalf of all those who purchased or otherwise acquired Eott Energy Partners, L.P. ("EOTT" or the "Company") common units between July 2, 2001 and January 22, 2002, inclusive (the "Class Period") and allege violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, as amended by the Private Securities Litigation Reform Act of 1995 ("PSLRA") (15 U.S.C. § 78(j)(b) and 78(t)) and Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5).

Class Members Sam E. Henry, Ted Zigan, and Melvin H. and Elsie M. Schulz (the "Henry Group") hereby move this Court for an order to: (i) appoint the Henry Group as Lead Plaintiff in the Actions under Section 21D(a)(3)(B) of the Exchange Act; and (ii) approve the Henry Group's selection of the law firms of Cauley Geller Bowman Coates & Rudman, LLP ("Cauley Geller") and Milberg Weiss Bershad Hynes and Lerach LLP ("Milberg Weiss") to serve as Lead Counsel and the law firms of Federman & Sherwood and Hoeffner & Bilek, LLP to serve as Liaison Counsel.

This motion is made on the grounds that the Henry Group is the most adequate plaintiff, as defined by the PSLRA. The Henry Group collectively suffered losses of \$391,989.00 in connection with its purchases of common units of EOTT during the Class Period.¹ See Federman

¹ The losses suffered by the Henry Group are not the same as their legally compensable damages, measurement of which is often a complex legal question which cannot be determined at this stage of the litigation. The approximate losses can, however, be determined from the certifications required under Section 21D of the Exchange Act and based upon reference to information concerning the current market for the Company's securities. The Henry Group's transactions in EOTT common units are set forth in the accompanying loss chart.

Decl. Ex. C.² To the best of our knowledge, this is the greatest loss sustained by any moving class member or class member group who has brought suit or filed an application to serve as Lead Plaintiff in these Actions. In addition, the Henry Group, for the purposes of this motion, adequately satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure in that their claim is typical of the claims of the putative class and that they will fairly and adequately represent the interests of the class.

FACTUAL BACKGROUND³

EOTT Energy Partners, L.P. is a major independent marketer and transporter of crude oil in North America. EOTT transports most of the lease crude oil it purchases via pipeline, which includes 8,200 miles of active intrastate and interstate pipeline and gathering systems. In addition, EOTT owns and operates a hydrocarbon processing plant and a natural gas liquids storage and pipeline grid system. EOTT Energy Corp., a wholly-owned subsidiary of Enron Corp., is the general partner of EOTT with headquarters in Houston.

The complaint alleges violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934. Specifically, the suit alleges that during the Class Period the Company disseminated false and misleading statements regarding EOTT'S financial performance and future prospects and substantially overstated the price of the Company's common units. On October 8, 2002, EOTT commenced a restructuring plan through a voluntary pre-negotiated

² References to the "Bilek Decl., Ex. __" are to the exhibits attached to the accompanying Declaration of Kelly Cox Bilek dated April 29, 2003 and submitted herewith.

³ These facts are drawn from the allegations in the complaint captioned Ward v. Horton, et al., 4:03cv484 (MH) (the "Ward Action"). See Bilek Decl. Ex. A.

Chapter 11 filing. As a result of this bankruptcy filing, EOTT is not named as a defendant in this action.

ARGUMENT

POINT I

THE HENRY GROUP SHOULD BE APPOINTED LEAD PLAINTIFF

A. The Procedure Required By The PSLRA

The PSLRA has established a procedure that governs the appointment of a Lead Plaintiff in "each private action arising under the [Securities Exchange Act] that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure." 15 U.S.C. § 78u-4(a)(1) and (a)(3)(B)(i).

First, the plaintiff who files the initial action must publish a notice to the class, within 20 days of filing the action, informing class members of their right to file a motion for appointment as Lead Plaintiff. 15 U.S.C. §§ 78u-4(a)(3)(A)(i). Plaintiff in the Ward action caused the first notice regarding the pendency of these actions to be published in Investor's Business Daily, a national, business-oriented newspaper, on February 28, 2003. See Bilek Decl. Ex. B. Within 60 days after publication of the notice, any person or group of persons who are members of the proposed class may apply to the Court to be appointed as Lead Plaintiff, whether or not they have previously filed a complaint in the action. 15 U.S.C. §§ 78u-4(a)(3)(A) and (B).

Second, the PSLRA provides that, within 90 days after publication of the notice, the Court shall consider any motion made by a class member and shall appoint as Lead Plaintiff the member or members of the class that the Court determines to be most capable of adequately

representing the interests of class members. 15 U.S.C. § 78u-4(a)(3)(B). In determining the "most adequate plaintiff," the PSLRA provides that:

[T]he court shall adopt a presumption that the most adequate plaintiff in any private action arising under this Act is the person or group of persons that

(aa) has either filed the complaint or made a motion in response to a notice...

(bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and

(cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

15 U.S.C. 78u-4(a)(3)(B)(iii). See generally Greebel v. FTP Software, 939 F. Supp. 57, 64 (D. Mass. 1996).

B. The Henry Group Satisfies the "Lead Plaintiff" Requirements Of The Exchange Act

1. The Henry Group Has Complied With The Exchange Act And Should Be Appointed Lead Plaintiff

The time period in which class members may move to be appointed Lead Plaintiff herein under 15 U.S.C. § 78u-4(a)(3)(A) and (B) expires on April 29, 2003. Pursuant to the provisions of the PSLRA and within the requisite time frame after publication of the required notice (published on February 28, 2003), the Henry Group timely moves this Court to be appointed Lead Plaintiff on behalf of all members of the class.

The Henry Group has duly signed and filed certifications stating that they are willing to serve as the representative party on behalf of the class. See Bilek Decl. Ex. D. In addition, the Henry Group has selected and retained competent counsel to represent them and the class. See

Bilek Decl. Ex. E-G. Accordingly, the Henry Group has satisfied the individual requirements of 15 U.S.C. § 78u-4(a)(3)(B) and is entitled to have their application for appointment as Lead Plaintiff and selection of Lead and Liaison Counsel as set forth herein, considered and approved by the Court.

2. The Henry Group Has The Requisite Financial Interest In The Relief Sought By The Class

During the Class Period, as evidenced by, among other things, the accompanying signed certifications, see Bilek Decl. Ex. D., the Henry Group purchased common units of EOTT in reliance upon the materially false and misleading statements issued by the defendants and was injured thereby. The Henry Group, combined, incurred a substantial \$391,989.00 loss on their transactions in EOTT common units. The Henry Group thus has a significant financial interest in this case. Therefore, the Henry Group satisfies all of the PSLRA's prerequisites for appointment as Lead Plaintiff in this action and should be appointed Lead Plaintiff pursuant to 15 U.S.C. § 78u-4(a)(3)(B).

3. The Henry Group Otherwise Satisfies Rule 23

According to 15 U.S.C. § 78u-4(a)(3)(B), in addition to possessing the largest financial interest in the outcome of the litigation, the Lead Plaintiff must also "otherwise satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure." Rule 23(a) provides that a party may serve as a class representative only if the following four requirements are satisfied: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Of the four prerequisites to class certification, only two -- typicality and adequacy -- directly address the personal characteristics of the class representative. Consequently, in deciding a motion to serve as Lead Plaintiff, the Court should limit its inquiry to the typicality and adequacy prongs of Rule 23(a), and defer examination of the remaining requirements until the Lead Plaintiff moves for class certification. Lax v. First Merchants Acceptance Corp., 1997 U.S. Dist. LEXIS 11866 at *20, (N.D. Ill. Aug. 6, 1997); Fischler v. Amsouth Bancorporation, No. 96-1567-Civ -T-17A, 1997 U.S. Dist. LEXIS 2875, at *7-8 (M.D. Fla. Feb. 6, 1997). The Henry Group satisfy both the typicality and adequacy requirements of Rule 23, thereby justifying their appointment as Lead Plaintiff.

Under Rule 23(a)(3), the claims or defenses of the representative parties must be typical of those of the class. Typicality exists where the plaintiffs' claims arise from the same series of events and are based on the same legal theories as the claims of all the class members. See Rossini v. Ogilvy & Mather, Inc., 798 F.2d 590, 598 (2d Cir. 1986). Typicality does not require that there be no factual differences between the class representatives and the class members because it is the generalized nature of the claims asserted which determines whether the class representatives are typical. See Priest v. Zayre Corp., 118 F.R.D. 552, 555 (D. Mass. 1988) ("With respect to typicality under Rule 23(a)(3), plaintiffs need not show substantial identity between their claims and those of absent class members, but need only show that their claims arise from the same course of conduct that gave rise to the claims of the absent [class] members") (citations omitted). The requirement that the proposed class representatives' claims be typical of the claims of the class does not mean, however, that the claims must be identical. Phillips v. Joint Legislative Comm. on Performance & Expenditure Review, 637 F.2d 1014,

1024 (5th Cir. 1981).

The Henry Group satisfies this requirement because, just like all other class members, they: (1) purchased EOTT common units during the Class Period; (2) purchased EOTT common units in reliance upon the allegedly materially false and misleading statements issued by defendants; and (3) suffered damages thereby. Thus, the Henry Group's claims are typical of those of other class members since their claims and the claims of other class members arise out of the same course of events.

Under Rule 23(a)(4) the representative parties must also "fairly and adequately protect the interests of the class." The PSLRA directs this Court to limit its inquiry regarding the adequacy of the Henry Group to represent the class to the existence of any conflicts between the interests of the Henry Group and the members of the class. The standard for adequacy of representation under Rule 23(a)(4) is met by: (1) the absence of potential conflict between the named plaintiffs and the class members; and (2) the class representatives' choice of counsel who is qualified, experienced and able to vigorously conduct the proposed litigation. Modell v. Eliot Sav. Bank, 139 F.R.D. 17, 23 (D. Mass. 1991) (citing Andrews v. Bechtel Power Corp., 780 F.2d 124, 130 (1st Cir. 1985)).

Here, the Henry Group is an adequate representative of the class. As evidenced by the injuries suffered by the Henry Group, who purchased EOTT common units at prices allegedly artificially inflated by defendants' materially false and misleading statements, the interests of the Henry Group is clearly aligned with the members of the class, and there is no evidence of any antagonism between the Henry Group's interests and those of the other members of the class. Further, the Henry Group has taken significant steps which demonstrates that they will protect

the interests of the class: they have retained competent and experienced counsel to prosecute these claims. In addition, as shown below, the Henry Group's proposed Lead and Liaison Counsel are highly qualified, experienced and able to conduct this complex litigation in a professional manner. Thus, the Henry Group prima facie satisfies the commonality, typicality and adequacy requirements of Rule 23 for the purposes of this motion.

POINT II

THE COURT SHOULD APPROVE THE HENRY GROUP'S CHOICE OF COUNSEL


Pursuant to 15 U.S.C. § 78u-4(a)(3)(B)(v), the proposed lead plaintiff shall, subject to Court approval, select and retain counsel to represent the class he seeks to represent. In that regard, the Henry Group has selected the law firms of Cauley Geller and Milberg Weiss as Lead Counsel and the law firms of Federman & Sherwood and Hoeffner & Bilek, LLP as Liaison Counsel, firms which have substantial experience in the prosecution of shareholder and securities class actions. See Bilek Decl. Ex. E-G. Accordingly, the Court should approve the Henry Group's selection of counsel.

CONCLUSION

For all the foregoing reasons, the Henry Group respectfully requests that the Court: (i) appoint the Henry Group as Lead Plaintiffs in the Actions; (ii) approve their selection of Lead and Liaison Counsel as set forth herein; and (iii) grant such other relief as the court may deem just and proper.

DATED: April 29, 2003

Respectfully submitted,


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CERTIFICATE OF SERVICE

Pursuant to Federal Rules of Civil Procedure, I hereby certify that a true and correct copy of this document has been forwarded to the following parties and/or their counsel of record, on April 29, 2003, via certified mail, return receipt requested, and/or via facsimile, and/or via U.S. Mail.


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